NO. 48991-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRANDON FARMER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Michael E. Schwartz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to give the defense proposed instructions on first and second degree manslaughter as lesser included offenses at Brandon Farmer's trial for first degree murder. CP 35-36, 39-42.

2. Prosecutorial misconduct deprived Farmer of his right to a fair trial.

Issues Pertaining to Assignments of Error

1. Where there was evidence the victim was shot by accident or during a struggle, did the court err in finding there was no factual basis for the legal lesser included offenses of first and second degree manslaughter?

2. The state's case hinged on the believability of its only alleged eyewitness, Dusty Titus. Titus only came forward to blame Farmer for the shooting when he was facing parole revocation and new charges and wanted to make a deal for himself. Did the state unfairly bolster Titus' credibility and therefore deprive Farmer of his right to a fair trial where the prosecutor: made misleading statements about Titus' motivation in coming forward; suggested he was not given favorable treatment (with regard to his parole) in

return for his testimony in this case; and intimated he was not immune from prosecution for his role in the shooting?

B. STATEMENT OF THE CASE[1]

1. Overview

On November 12, 2014, the Pierce county prosecutor charged appellant Brandon Farmer with first degree murder while armed with a firearm for the shooting death of Velma Tirado on August 27, 2006. CP 1-2. Tirado was reportedly working as a prostitute in Tacoma when she was shot. CP 3-4. The current charge was filed after detectives in Humboldt county California met with Dusty Titus and his defense attorney; Titus claimed Farmer shot Tirado after the two men picked her up for prostitution. CP 3-4; RP 690. Significantly, Titus was facing parole revocation and the potential reinstatement of concurrent eight-year sentences on two prior felony convictions, as well as new felony charges, when he came forward with the information, hoping to make a deal. CP 9; RP 37-38, 687.

[1] The verbatim report of proceedings is referred to as "RP" and contained in eight bound volumes, consecutively paginated.

When police traveled to West Virginia to interview Farmer, Farmer reported it was Titus who pulled a gun when Tirado wanted more money. Afraid Titus planned to shoot Tirado, Farmer pushed Titus and the gun went off. CP 4. CP 4. In a panic, Farmer drove them away from the scene. CP 4.

Farmer was convicted following a jury trial. CP 84, 86. The court sentenced him to approximately 34 years of incarceration. CP 126. At sentencing, the court made an express finding Farmer does not have the ability or likely future ability to pay discretionary legal financial obligations (LFOs). RP 962. This appeal follows. CP 138.

2. Trial Testimony

Around 2:30 a.m. on August 27, 2006, off-duty Tacoma police officer Gary Keefer was getting off work from his side job working security at the Swiss Restaurant in Tacoma. RP 82. He heard loud banging noises as he was getting ready to leave, but thought it was the band loading up its equipment. RP 83.

As Keefer drove south on Jefferson Avenue towards South 21st Street, a van pulled in behind him and started flashing its high beams. Keefer pulled over and contacted the driver, Renee Scott. RP 84, 109.

Scott was in a panic, pointed west and said someone had been shot in the alley. RP 85. Keefer drove west and turned north into Court D, an alley between Market Street and Fawcett Avenue, bordered by South 21st Street to the south and South 19th to the north. RP 85, 92, 213. Midway down the alley on the eastern side, Keefer saw a woman's body with a gunshot wound to her head. RP 86-87.

Scott had parked in the alley earlier that evening, as he frequently spent the night in his van there. RP 170. He and Gregory Thompson had been parked facing south towards South 21st Street for about a half hour when Scott noticed another vehicle pull up and park facing north about half a block down. RP 172, 178. Scott testified he heard gunfire and the other vehicle drove quickly up the alley past him and took a left on South 19th Street. RP 175, 177.

Scott decided to leave and as he drove toward South 21st Street, saw a woman lying on the side of the road. RP 175. Scott went to get help and eventually flagged down officer Keefer. RP 176, 179. It was not until a few days later Scott realized he actually knew the woman, whom he called "Val." RP 181.

Thompson testified that when the other car drove past him and Scott, he thought it sounded like a standard transmission. Thompson could hear the gears shifting. RP 129. He thought it was a small car or pickup truck. RP 138.

Rick Kimes was living in a house on Fawcett at the time of the shooting. RP 280. The window to his bedroom faced the alley. RP 280-81, 287. The night of the shooting, he heard two shots, "bang, bang," with barely a pause between them. RP 282. When he looked out the window, he saw the taillights of what sounded like "a low rider pickup truck." RP 283. Kimes went out the door and saw the woman's body; his wife called police. RP 281.

Gene Miller was the lead detective assigned to the case. RP 380. As part of his investigation, he went to various transient camps with a picture of the woman. He learned her street name was "Val" and since she appeared Native American, he went to the Puyallup Tribal Health Center, where staff identified her as Velma Tirado. RP 395.

Barbara Williams knew Tirado from the homeless camp behind the Tacoma Men's Mission. RP 348, 398. Tirado frequently bought cocaine from Williams, and the two were friends. RP 349. Williams testified the night of August 26, 2006 was the last time she

saw Tirado. RP 349. That night, Tirado left the camp to make some money. RP 353. Williams did not inquire whether Tirado's plan involved prostitution. RP 355.

Tirado suffered two gunshot wounds, one to the end of her left ring finger and one just behind her right ear, which she died from. RP 389, 441, 455. There was stippling on her left hand, which is consistent with being shot within close proximity. RP 389, 411, 447. There was also stippling around the ear wound. RP 390, 442. Tirado had an injury to her right palm that appeared to have stippling as well. RP 396. According to the medical examiner, there was at least one shot. It was possible Tirado had her left hand up over her right ear and one shot caused both injuries. RP 457.

One bullet was recovered from the autopsy. RP 401, 443. It was sent for testing. RP 404. The firearm examiner opined that it had been shot out of a Ruger or Smith and Wesson .357 or .38 revolver. RP 404. The case grew cold and police had no leads as of 2010. RP 407.

However, on October 21, 2014, Miller received a phone call from the Humboldt county district attorney's office indicating Dusty Titus had identified Brandon Farmer as the shooter. RP 414-15.

In 2010, Titus was convicted of two felonies in California. He received an eight-year suspended sentence and three years of felony probation. RP 516. In 2014, Titus was charged with a string of new felonies.[2] RP 516, 624. As a result, he was also facing parole revocation. RP 516, 593-94. It was at this time Titus contacted his attorney to see if he would receive better treatment if he reported to law enforcement what he claimed happened to Tirado in 2006. RP 516-17. Eventually, all of Titus' violations in California were "worked out" and he was considered to be in compliance with probation.[3] RP 517. If Titus remains in compliance, he will serve no additional jail time. RP 516, 710.

Titus testified that in the summer of 2006, he lived across the street from Farmer, near downtown Tacoma. RP 512. They sometimes went out drinking together or to shoot firearms. RP 519. Titus claimed that on one occasion, Farmer commented about wanting to kill someone. RP 529. However, he said it in a "joking manner" and Titus did not take it as a serious expression. RP 529.

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[2] The precise number is unclear but appears to be between 7 and 10. RP 624-25.

[3] Interestingly, probation was kept out of the loop on the deal that was struck; Titus' probation officer was told only that Titus was cooperating in a case in Washington. RP 598, 602-605, 628.

At the time, Titus had a Lorcin .380 semiautomatic pistol. RP 519. Farmer did not own a gun, but Titus was with him when he reportedly obtained one from a friend. RP 520. They originally went to the friend's house to get ammunition for Titus' gun. Farmer went inside and returned with ammunition for Titus' gun, as well as a Ruger Blackhawk .357 magnum single action revolver.[4] RP 521.

Titus claimed that on August 26, 2006, he and Farmer were drinking and driving around in Titus' truck, a blue 1987 Chevy S-10 pickup. RP 526. It had a single bench seat. RP 526. Around 2:00 a.m., as they drove toward an industrial park near downtown Tacoma, they encountered Tirado. RP 528. Farmer acknowledged her and asked if she "was working." RP 528-29.

Tirado said she was, and Farmer reportedly got out to let her in on the passenger side. RP 530. Titus claimed he was driving. RP 531. However, when describing why they had pulled over by the industrial park in the first place, Titus testified:

> I don't remember exactly the reason on why he had pulled off right there. I think we might have been trying to figure out what we were going to be doing next, or where we were going or something, but she

[4] Titus testified he was familiar with the gun because he and Farmer went shooting a couple of times and he shot it. RP 521. He also purchased one like it a year later from his supervisor at work, which he sold to his stepfather David Hamilton. RP 522, 590, 654.

> ended up walking by, and that's when Brandon hollered at her.

RP 528 (emphasis added).

According to Titus, Farmer was joking it was Titus' birthday, as if to signal they picked Tirado up for him. RP 532. Titus reportedly said, "No, I'm okay." RP 532. Titus claimed Farmer responded, "well, I guess that it will just be me then." RP 532.

They drove a couple hundred yards and parked in the alley. RP 532. Titus testified he saw a Ford Explorer or Ford Bronco parked on the opposite side of the street facing him. RP 534. There were at least two people inside. RP 534.

According to Titus, Tirado began performing oral sex on Farmer right inside the truck. RP 535. Farmer reportedly asked Tirado if she wanted to move outside and opened the passenger door. RP 535. Titus testified Farmer and Tirado got out of the truck with Farmer facing towards the bed of the truck and Tirado on her knees in from of him. RP 535.

Titus testified he was unsure what happened, if Farmer ejaculated or Tirado just stopped, but she stood up and Farmer reportedly reached behind him and pulled the .357 out of his waistband and put it to Tirado's head and squeezed the trigger. RP

536. Titus testified he saw a muzzle flash, followed by Tirado pushing the gun away. RP 537. Titus claimed she pushed it away with her left hand.[5] RP 537. According to Titus, Farmer cocked the gun and put it to Tirado's head again, whereupon she reportedly went rigid and fell backwards. RP 537. Titus claimed "she just went, pretty much went stiff, or went rigid and fell to the ground, and there was no, like, no life, no nothing left." RP 540.

Yet, Titus' description did not match the physical evidence. Police found a pool of blood towards South 21st Street. RP 198. They also observed drops of blood on the pavement leading to where Tirado finally collapsed, 57 feet away. RP 198, 203, 235. The medical examiner testified that despite her injuries, it was possible Tirado could have walked 60 feet before collapsing. RP 460.

[5] Significantly, however, the stippling noticed on Tirado's right palm was consistent with it being close to the gun when it was fired. RP 396.

Titus also claimed Tirado was shot while standing and facing Farmer.[6] RP 573. However, forensic pathologist and Oregon medical examiner Dr. Clifford Nelson testified it would have been physically impossible for Tirado to sustain the injuries she did while standing up facing her shooter. RP 747-49. Based on the stippling to Tirado's left ring finger and the stippling around her right ear, and the lack of any stippling over the entrance to the head wound, Nelson opined Tirado's left hand was blocking when she was shot. RP 750. Rather than standing face-to-face with the shooter, Nelson opined Tirado's head and shoulders were lower and twisted to her left away from the shooter. RP 753-54.

Nelson testified there was a small laceration and stippling on Tirado's right hand, which could be consistent with "cylinder gap." RP 745. Nelson explained that powder, soot and small fragments of metal sometimes expand out from the side of the cylinder when the trigger is pulled and the bullet jumps from the cylinder into the barrel. RP 745. In Nelson's opinion, the laceration on Tirado's right hand could be indicative of being caught on something sharp in the mechanism when the cylinder was rotating, or indicative of "cylinder gap." RP 745. He opined Tirado's hand was either

[6] This is also what he told detective Miller during an interview. RP 827.

touching the gun or within millimeters of it to have sustained the injury. RP 759. Nelson testified that obviously, there was one shot, probably two. RP 754, 759.

Next, Titus claimed he grabbed his gun but the bottom of the clip fell off and all the parts inside fell to the floorboard except the bullet in the chamber. RP 539. Titus testified Farmer jumped back in the truck and Titus drove them away. RP 540.

Titus testified Tirado's purse was still on the center console below his gear shifter. RP 541. Titus claimed Farmer looked through it and tossed it out onto the sidewalk as they drove west on South 19th Street.[7] RP 542. Titus testified he drove straight home. RP 542.

Several days later, Titus reportedly noticed the gun underneath the seat on the passenger side and waved Farmer over to his truck. RP 543. Titus claimed he told Farmer to take the gun. Farmer reportedly told Titus to hand it to him, but Titus didn't want to touch it. RP 544. Reportedly, Farmer got in the truck and retrieved the gun. RP 544. According to Titus, Farmer asked if he was upset and said something about the shooting being no big

[7] Detective Miller testified that during an interview with Farmer, Farmer said he discarded the purse out the passenger window. RP 840.

deal. RP 545. Titus testified he did not like being around Farmer after that and eventually moved away. RP 545.

In anticipation of trial, detective Miller listened to 100s of recorded telephone calls made by Farmer. RP 712. At trial, the state offered one in which Farmer was speaking to his brother and asserted it was Titus who shot Tirado not Farmer; but Titus got off with no criminal charges because he is the one who talked to police first. RP 774-75; Ex 153.

At the time of trial, Farmer was an electrician living in West Virginia with his wife and four children. RP 761. In 2006, when Farmer was serving in the army, he lived in Tacoma across from Titus. RP 762.

Farmer testified he remembered the night Titus shot Tirado. RP 763. He and Titus met up around 8:00 or 9:00 p.m., and went to a couple different bars. RP 765. Farmer testified he and Titus were at the 40th Street Pub drinking until approximately 1:30 a.m. RP 765. They also both bought crack cocaine.[8] RP 765.

Afterward, they drove to another bar near downtown, but it had already given last call. RP 766, 768. Farmer was driving Titus' car and started to drive toward the waterfront, but Titus told Farmer

[8] Titus claimed he was not using drugs at this point in his life. RP 526-27.

to turn around, as he was nervous they had been drinking and had drugs in the car.[9] RP 768-69. When Farmer turned around, Titus told him to pull into a parking lot. RP 768.

Farmer testified they were smoking cocaine when Tirado walked by. RP 769. When Farmer asked if she was working, Tirado indicated she was. RP 770. Titus got out of the passenger side of the truck to let Tirado in. RP 770. Farmer testified Tirado smoked cocaine with them. RP 770.

When Farmer started to drive up the hill, Tirado directed him into an alley. RP 770. Farmer could see a few other vehicles in the alley, one with a couple of other people in it. RP 771. When Farmer parked, Tirado started to give him oral sex. RP 771. Farmer was unsure why, but Tirado stopped. RP 771. According to Farmer, Tirado reached for the pipe, but Titus said it was his turn. RP 771.

[9] Prior to the night of the incident, Titus had been drinking and crashed his car. At the time of the shooting, he had not yet been charged but potentially faced a driving-under-the-influence charge. RP 578. Eventually, he entered into a deferred prosecution program. RP 579. At some point thereafter, he was serving home detention for violating the terms of his ignition interlock or for driving with a suspended license. RP 579. Titus cut off his ankle bracelet and moved to California. RP 579.

Tirado reportedly responded, "what do you got for me?" RP 771. Titus indicated Tirado already received what she was going to receive, i.e. cocaine. RP 771.

Titus reached under the seat, grabbed the gun, got out of the truck and told Tirado to get out. RP 771. Tirado started to get out, but reached back around, presumably for her purse. RP 772. At that point, Titus reached in and grabbed her and pulled her out of the truck. RP 772. Farmer couldn't tell whether Tirado hit Titus or Titus tripped, but he stumbled back against the door and the gun went off. RP 772, 791.

Panicking, Farmer started the truck. As he did so, he heard the gun go off again. RP 772. Titus got back in the truck and Farmer drove to the end of the alley, turned left up the hill and drove them home. RP 772-773. On the way, Farmer pulled over and discarded Tirado's purse. RP 801, 807. Farmer also asked Titus why he would shoot the gun, Titus said he didn't mean to but that Tirado tried to grab the gun from him. RP 773. Farmer testified he never went out with Titus again, after that night. RP 773.

On cross, the prosecutor asked whether Farmer remembered telling detective Miller that when Titus pulled the gun

out, Farmer thought he was going to shoot Tirado and so Farmer pushed Titus and that's when the gun went off. RP 792. Farmer denied making this statement. RP 792, 795.

In rebuttal, the state recalled detective Miller. RP 832. Miller testified that following his interview with Titus in California, he went to West Virginia and interviewed Farmer. RP 836. According to Miller, Farmer said Tirado was shot by accident. RP 841. Farmer told Miller that when Titus pulled the gun, Farmer was afraid Titus was going to shoot Tirado, so Farmer pushed Titus and "the gun just went off." RP 841-42.

B. ARGUMENT

1. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF FIRST AND SECOND DEGREE MANSLAUGHTER.

Farmer told detective Miller he pushed Titus and caused the gun to go off and hit Tirado. That Tirado was shot by accident supported giving the defense proposed instructions on first and second degree manslaughter. CP 35-36, 39-42. The laceration and stippling on Tirado's right hand also suggested that Tirado was shot during a struggle. RP 855. This evidence also supported giving manslaughter instructions.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. State v. Fernandez-Medina, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000); State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). In Washington,

> A defendant is entitled to an instruction on a lesser included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.

State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Each of the elements of first and second degree manslaughter are a necessary element of first and second degree murder, as the court and parties here recognized. See also State v. Hunter, 152 Wn. App. 30, 216 P.3d 421 (2009). Thus, Farmer was entitled to the instructions if a rational jury could have found Farmer guilty of the offenses based on the evidence presented. Hunter, 152 Wn. App. at 43.

The purpose of the second prong of Workman is to ensure that there is evidence to support the giving of the requested instruction. This factual showing must be "more particularized than that required for other jury instructions" and "must raise an

inference that only the lesser included ... offense was committed to the exclusion of the charged offense." Fernandez-Medina, 141 Wn.2d at 455. "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). This rule is intended to allow both parties to "have jury instructions embodying its theory of the case" but only "if there is evidence to support that theory. It is error to give an instruction not supported by the evidence." Warden, 133 Wn.2d at 563.

In evaluating the factual prong, courts must "view the supporting evidence in the light most favorable to the party that requested the instruction." But "the evidence must affirmatively establish the defendant's theory of the case – it is not enough that the jury might disbelieve the evidence pointing to guilt." Fernandez-Medina, 133 Wn.2d at 563.

In evaluating the factual prong here, the lower court focused solely on Farmer's testimony:

> I think as both parties acknowledged yesterday the standard that the Court uses in determining whether to give lesser includeds found under State v. Workman in which the analysis have that of both a legal prong and a factual prong. In this case certainly

> there is the legal prong present that Manslaughter in the First Degree and Manslaughter in the Second Degree are legally lesser included offenses of Murder in the First Degree and Murder in the Second Degree.
>
> However, as to the factual prong the Court believes that there was not sufficient evidence to demonstrate that the acts of the defendant here were neither [sic] reckless, nor criminally negligent. Based on the defendant's own testimony, he was not the individual who was the shooter here. Rather, it was Mr. Titus. And for that reason, as well as the physical evidence that's been demonstrated here, it's the belief of the Court that the factual prong under Workman does not exist here and therefore will decline to give those lesser included offenses.

RP 855-56.

However, the court took an unreasonably limited view of the evidence. See e.g. State v. Fernandez-Medina, 141 Wn.2d at 446 (Fernandez-Medina entitled to inferior degree offense instruction based in part on state's expert's testimony). The decision in Fernandez-Medina is instructive here.

Roiland Fernandez-Medina had a falling out with his girlfriend Ann Carpenter, and Carpenter told him to take his stuff and get out of their apartment. Later that night, Carpenter became concerned when she saw a car parked outside that Fernandez-Medina was known to drive. She went over to her neighbor's apartment and spoke with her friends Dorothy Perkins and Wayne Butler about her concern. Fernandez-Medina, 141 Wn.2d at 450.

Shortly thereafter, someone knocked on the door and Butler saw two men standing outside the door. When Butler opened the door slightly, one of the men – later identified as Fernandez-Medina – burst in and began firing a handgun into the apartment. Butler was struck by at least two bullets. Carpenter's response was to run into the bathroom as Fernandez-Medina strode into the apartment, firing at her. Perkins tried to run away but as she did so, stumbled and fell down. Fernandez-Medina, at 450-51.

After Fernandez-Medina had fired approximately five shots, his companion said something that was not understood by anyone else in the apartment. Fernandez-Medina began to walk toward the front door; but as he did so, he passed very close to Perkins, who was still lying on the floor. According to Perkins, Fernandez-Medina paused and pointed the gun at her head. Perkins closed her eyes and heard a clicking sound. None of the witnesses claimed they saw Fernandez-Medina pull the trigger at that point. Carpenter said she also heard a click, but no bullet came out as Fernandez-Medina paused and pointed his gun at Perkins, before he slowly ran out the door. Fernandez-Medina, at 451.

Fernandez-Medina was charged inter alia with attempted first degree murder of Perkins and alternately, with first degree

assault of Perkins. At trial, Carpenter, Butler and Perkins testified consistently with the facts recounted above. Fernandez-Medina also testified, but claimed he was not at the apartment; rather, he spent the night at a friend's house. Fernandez-Medina, at 451.

The defense presented testimony from an expert who indicated that various noises can emanate from the type of handgun allegedly used by Fernandez-Medina, even when the trigger is not pulled. In support, the expert manipulated various models of .380 handguns and demonstrated various sounds such weapons can emit. The state's expert also testified that such a handgun can make various clicking noises, even when the trigger is not pulled. Fernandez-Medina, at 452.

At the close of evidence, Fernandez-Medina requested an instruction on second degree assault as an inferior degree offense of first degree assault, but the trial court declined to give the instruction. On appeal, Division Two affirmed on grounds Fernandez-Medina's alibi defense negated an inference that only the lesser included offense had been committed. Id.

The Supreme Court reversed on grounds the trial and appellate courts took an overly limited view of the evidence:

If the trial court was to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, Fernandez–Medina claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given. See State v. Bright, 129 Wash.2d 257, 269–70, 916 P.2d 922 (1996) (using State's evidence to justify an instruction on an inferior degree offense). Here, testimony was presented by two forensic experts, one of whom testified for the defendant. Viewing the testimony of both experts most favorably to Fernandez–Medina, we are satisfied that it raised an inference that the "clicking sound" Perkins claimed she heard was not caused by Fernandez–Medina pulling the trigger as he pointed the gun at her. Indeed, it was this testimony that prompted Fernandez–Medina's counsel to seek to present a theory that Fernandez–Medina did not attempt to fire the handgun at Perkins. Such a theory was entirely consistent with the testimony of Butler, Perkins and Carpenter to the effect that the handgun had been fired five times, thus implying that it was capable of being fired again if the shooter intended to fire it. If the requested instruction had been given, the jury might reasonably have inferred from all of the evidence that Fernandez–Medina did not intend to do great bodily injury to Perkins, an element of first degree assault as charged in count II. Rather, it could have rationally concluded that as Fernandez–Medina pointed a gun at Perkins' head, it made a clicking sound that was not caused by the pulling of the trigger. If the jury had reached such a conclusion, it would have to reach the additional conclusion that by pointing a deadly weapon (the gun) at Perkins' head, Fernandez–Medina put her "in apprehension of harm," thereby committing second degree assault rather than first

> degree assault. State v. Aumick, 126 Wash.2d 422, 426 n. 12, 894 P.2d 1325 (1995) (defining assault). Such a finding would have been consistent with the defendant's theory that he was guilty of only the inferior degree offense of second degree assault.

Fernandez-Medina, 141 Wn.2d at 456–57 (footnotes omitted).

As in Fernandez-Medina, the trial court here took an overly limited view of the evidence by examining only the testimony of the defendant. While Farmer testified Tirado pushed Titus and or Titus tripped and the gun went off, there was also physical evidence indicating Tirado was shot during a struggle for the gun. As defense counsel indicated when the court declined to give the proposed manslaughter instructions:

> We believe that the facts do support Manslaughter 1 and 2. If one is to take into account the injury to the right hand, which is basically the cylinder burn to the right hand, and the testimony, the jury could believe that based on the various testimonies, at least of Mr. Titus and Mr. Farmer, and there was some kind of struggle and the gun went off during the struggle, and that there wasn't necessarily an attempt to kill. So we would object to that.

RP 855. If the jury believed the gun went off during a struggle, it likewise could believe that the shooting was not intentional but rather, the result of negligence of recklessness. In other words, that Farmer committed manslaughter not an intentional killing.

The court also took an overly limited view of the evidence by failing to evaluate the instruction based on Farmer's statement to Miller that he pushed Titus, causing the gun to go off accidentally. Although Farmer denied saying this to Miller, Miller testified the statement was made. If believed, the jury again could have believed that the shooting was not intentional, but rather, the result of negligence or recklessness.

In response, the state may point to the evidence suggesting there were two shots. However, both experts testified it was possible there was only one shot. RP 457, 754. And one of the witnesses testified the second shot he heard could have been an echo. When asked if he remembered anything about "the pace of the shots," Gregory Thompson testified: "They were pretty closely set. I think it might have been an echo, or maybe just been one shot." RP 128. Significantly, only one bullet was recovered. RP 452. Thus, there was evidence Tirado was shot one time during a struggle or by accident.

There is no requirement in Washington case law that a defendant's testimony be consistent with the rest of the evidence presented at trial. Fernandez-Medina, 141 Wn.2d at 458-59. Thus, the court was wrong to focus solely on Farmer's testimony when

evaluating the propriety of the proposed instructions. Because there was a factual basis for the manslaughter instructions, the court erred in failing to give them.

2. PROSECUTORIAL MISCONDUCT DEPRIVED FARMER OF HIS RIGHT TO A FAIR TRIAL.

Titus and Farmer were the only witnesses to the shooting and each accused the other of being the perpetrator. There was no physical evidence pointing to either one. Therefore, the state's case hinged on the jury believing Titus' version of events. Significantly, Titus had serious motivation to try to frame Farmer, as Titus was facing a string of new felony charges and parole revocation when he came forward, hoping to cut a deal. Although the fact of Titus' new charges and his potential parole revocation were made known to the jury, the state made misleading statements in opening statement and in closing argument – and in its examination of witnesses – to plant the seed that Titus' motivation was in reality more altruistic than it may appear, and that the benefits he received in exchange for his cooperation were not as extraordinary as they may also appear. These misleading statements and questions constituted misconduct as they unfairly bolstered Titus's credibility.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Finch, 137 Wash.2d 792, 843, 975 P.2d 967 (1999).

Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics.

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Monday, 171 Wn.2d at 676. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted); see also United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.1988) (analysis of a claim of prosecutorial misconduct focuses on its asserted impropriety and substantial prejudicial effect). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Yates, 161 Wash.2d 714, 774, 168 P.3d 359 (2007).

Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be flagrant and ill-intentioned. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). However, if the misconduct is flagrant, the petitioner has not waived his right to review of the conduct. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). In such cases, reversal is required if the misconduct caused an enduring and resulting prejudice. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307, 311 (2008).

A prosecutor commits misconduct by urging the jury to convict based on evidence outside the record. State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Although a prosecutor has wide latitude to argue reasonable inferences from the

evidence, it is improper for a prosecutor to make arguments based on facts not in evidence or to misrepresent the facts. Belgarde, 110 Wn.2d at 507–08. That is exactly what the prosecutor did here repeatedly – misrepresent the facts or twist them in such a way as to mislead the jury.

(i) Opening Statement

In opening statement, the prosecutor claimed Titus came forward because he grew up and it was time to tell what happened:

> Police do what they can, but nobody comes forward, and the case grows cold. Dusty moves back to California. He grows up. He decides it is time to tell people what happened.
>
> They tell him, "You are not getting any benefit from this, no promises." And he goes, "I know. I get it. But I need to tell somebody, and he does.

RP 23-24.

This was a blatant misrepresentation. As of April 1, 2014, Titus had been charged with 10 new felonies. RP 624-25. As a result, probation filed its first amended violation of probation. RP 625. On April 1, 2014, probation filed its second amended violation of probation for Titus' failure to comply with sex offender treatment. RP 496-97.

Titus contacted his attorney David Lee as early as February 2014, to see if he (Titus) would receive better treatment if he

reported to law enforcement what he claimed happened to Tirado in 2006. RP 516-17. It was not until October and November 2014,[10] that Titus spoke with authorities – after his attorney and the district attorney had already been negotiating (RP 494-95) – and it clearly was *not* motivated by his simple need to "tell somebody."

(ii) Direct and Redirect of Titus

On direct of Titus, the prosecutor elicited that Titus had no "formal plea agreement" with either California authorities or Washington authorities:

> Q. [prosecutor] At any point did you enter into any kind of formal plea agreement with anybody from the Washington prosecutor's?
>
> A. No.
>
> Q. How about down in California?
>
> A. No.

RP 518.

On redirect, the prosecutor similarly elicited that Titus came forward on his own and that when he spoke to Cox and detective Miller in the Fall of 2014, he was made "no promises:"

[10] Titus spoke with officer Wayne Cox from Humboldt County in October 2014. RP 547. Titus claimed he did not remember telling officer Cox that he would cooperate only if he wouldn't be prosecuted "an accomplice or an accessory." RP 548; ex 114. Titus spoke with detective Miller thereafter. RP 414.

Q. ... if you hadn't come forward, the police weren't knocking on your door asking you about this murder up in Tacoma as far as you know?

A. I came forward on my own.

Q. Right. All right. Let's see. I'm going to hand you what's marked as Exhibit 114. Do you remember up front, this is the transcript with Mr. Cox, do you remember Mr. Cox telling you anything about if there were any promises?

A. No, there was no promises either down there or up here.

Q. Okay. And he actually told you that, right?

A. There was no guarantee that I wouldn't get charged, or they were going to help me out in any way.

Q. And then in Exhibit 115, which is your transcript when Detective Miller went down and talked to you, do you remember Mr. Cox telling you the same thing, no promises?

A. Yes.

RP 586-87.

While there may not have been any "formal agreement" or promises made, this line of inquiry is still misleading because it suggested there were not ongoing negotiations occurring, and clearly there was ongoing negotiation. Titus had approached his attorney as early as February 2014. On cross-examination, Titus admitted that between February and October 2014, his attorney

and attorney's investigator had been trying to get Titus a deal. RP 549.

This is also evidenced by the fact a "Second Amended Petition" to revoke probation was filed April 1, 2014, for Titus' failure to do sex offender treatment. RP 496-97. When Titus spoke with authorities in October 2014, however, he still was not being required to do the treatment because, as he explained, "The district attorney and my attorney weren't clear on what they should do as far as my violation, so they had continued putting if off until they came up with a resolution." RP 494-95.

Accordingly, the prosecutor's questions about there being no "formal agreement" or promises made was misleading and suggested Titus did not expect anything for his cooperation, which again, clearly was not the case.

(iii) Direct of Detective Miller

On direct of Miller, the prosecutor played a snippet of a recorded phone call in which Farmer spoke to his brother about charges the prosecutor should have levied against Titus, even assuming the prosecutor believed his story, such as being an accessory. RP 702.

Immediately thereafter, the prosecutor elicited from Miller that Titus never received "immunity:"

> Q. Detective Miller, to the best of your knowledge, did Dusty Titus ever receive immunity?
>
> A. No.

RP 702.

This was also misleading because it suggested Titus still could face potential charges for the part he played (even assuming his story is believed), such as aiding and abetting, when the state had no intention whatsoever in charging him. As the prosecutor stated later (in response to defense counsel's motion for a new trial): "It's not true that he had an immunity agreement. He never had one. He is not prosecutable because there are no facts to prosecute him." RP 938. From this, it is abundantly clear the state of Washington had no plans to prosecute Titus for anything. But by eliciting that he didn't receive "immunity," the prosecutor made the suggestion that Titus was testifying at great risk to himself – and therefore his story more credible – which was not in fact true.

Indeed, the court itself was disturbed by the prosecutor's implication:

> I want to express something to both of you. This is kind – this is kind of mainly aimed here at the

> State. I'm somewhat disturbed that there is this, I don't know how to say it, perhaps the impression that Dusty Titus has not gotten a deal here. I think it's rather disingenuous to stand up in front of this jury to say he hasn't received any kind of benefit.
>
> The distinction between an immunity agreement and a benefit really is not something that this jury is capable of understanding. You know, immunity has a distinct legal definition to it. And I think that it's quite clear from the evidence here that Dusty Titus has received a benefit. I say this only to the extent that we are going to get to closing arguments next week, and I, again, I'm not certain it would be proper to articulate to this jury that somehow he hasn't received some kind of benefit. And so I want to make that clear for everybody here.

RP 715.

In response, the prosecutor reiterated there had been no "formal agreement," to which the court indicated that such was the standard practice for obvious reasons:

> MR. PENNER: If I could, I think we have been clear that we are not suggesting that he wasn't looking for a benefit, or that I think he has gotten through that, just that there wasn't a formal agreement, and he entered into this knowing there was no formal agreement, and I think that's –
>
> THE COURT: I understand that, but I also have an understanding, having done this, there is a reason that there is not a formal agreement in many instances.

RP 716.

(iv) Closing Argument

In its first part of the state's closing, the prosecutor again suggested that Titus still could face charges for his role in Tirado's shooting:

> While there is certainly reason to believe that Dusty received a benefit for his cooperation, it was not under an immunity agreement with the State of Washington. Benefit or not, in coming forward Dusty placed himself at the scene of the crime. He admitted to driving the shooter away from the scene . . .
>
> Why would Dusty place himself at the scene and admit to owning a similar type weapon? He had been hoping to avoid prison time in California. He's not guaranteed a walk here in Washington. Because he knew he was telling the truth.

RP 865.

By stating "He's not guaranteed a walk here in Washington," the prosecutor is again insinuating it is not a foregone conclusion Titus will not be charged for his role. Again, the state is misrepresenting the risk posed to Titus and thereby unfairly upping his credibility, as the prosecutor's office has no intention of charging him with anything.

Because defense counsel moved for a mistrial on grounds of this "immunity" argument, this misconduct should be reviewed under the more deferential standard for prosecutorial misconduct. RP 935-37; State v. Lindsay, 180 Wn.2d 423, 431, 326 P.3d 125

(2014) (citing United States v. Prantil, 764 F.2d 548, 555 n. 4 (9th Cir.1985) (mistrial motion following the prosecutor's closing is "an acceptable mechanism by which to preserve challenges to prosecutorial conduct").

(v) Rebuttal Closing

The prosecutor argued Titus did not actually receive favorable treatment in California with regard to his parole:

> You heard he was told repeatedly there is no promises or deals upfront, but we will see what you have to say.
>
> Mr. Smith did not testify that he wasn't given sanctions. He said just the opposite. He had been repeatedly sanctioned and incarcerated for his probation violations, and he was treated just like everybody else. And that two-year gap, guess what? He has two years of probation now because of that. He would be done otherwise.

RP 896.

Whether Titus was repeatedly sanctioned *before* he began cooperating on this case, that clearly was not the case once he was. Duane Smith testified he had been Titus' probation officer for two years. RP 592. As Smith testified, Titus violated probation by picking up new charges, not reporting and not complying with treatment. RP 593. Smith submitted a violation report to the court

recommending Titus' probation be revoked in February 2014.[11] RP 594, 597.

Despite this, Titus was let out just a few days later and the sentencing hearing for the violation had only just been scheduled for April 4, 2016. RP 596-597.

In Smith's experience, this two-year time gap was unusual. RP 597. His supervisor inquired of the district attorney's office and was told only that Titus "was cooperating in a case in Washington State." RP 598. In fact, probation was so concerned that after the first 16 months went by with no court date, Smith's supervisor sent another report to the court "to make sure the court knows so we feel like the liability is off of us." RP 605.

And ultimately, Titus testified that he does not expect to do any additional jail time for either the probation violations or the new felony charges. Presumably, Titus would be aware of the recommendation his attorney and the district attorney would be making and whether it would involve jail time.

[11] Because it is the court that decides the sanction, the prosecutor's questions of Duane Smith, regarding whether the California DA or any prosecutor from Washington asked him "not to punish" Titus were also misleading. RP 598. The probation officer has no authority to punish anyone.

Additionally, the prosecutor made an offer of proof as to the status of Titus' sex offender treatment after speaking to Beverly Ford, the supervisor of probation. RP 485. She told him that Titus is not expected to complete it and will not be violated for his failure to do so. RP 485.

The fact Titus still has to do probation for the two-year period of time he was "summarily revoked," hardly equates to the prosecutor's assertion that he has been treated like everybody else. In fact, Smith testified that even though his office tacked on the additional time, Titus would only be on probation for one additional year, not 26 months. RP 599. Thus, the prosecutor's claim that Titus was treated just like everybody else is patently false.

(vi) Prejudice

There are two standards for determining prejudice stemming from prosecutorial misconduct. If there has been an objection, prejudice is established when there is a substantial likelihood that the misconduct affected the jury's verdict.[12] Monday, 171 Wn.2d at 578. If defense counsel failed to object, there is a heightened standard. The defendant must show not only that the misconduct likely effected the jury, but also that the conduct was so flagrant or

ill-intentioned that it evinces an enduring prejudice that could not have been cured by an instruction to the jury. In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673, 678 (2012).

The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions could erase their combined prejudicial effect. State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). In such cases, reversal is required. In re Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673(2012). This is one of those cases.

Again, the state's case hinged on Titus' credibility. Repeatedly, the prosecutor misrepresented or twisted the facts to make it look like Titus was risking more and gaining less than he actually was by testifying against Farmer. This unfairly bolstered the state's case while undercutting the defense theory that Titus should not be trusted because he had improper motives for claiming Farmer committed the shooting.

[12] As indicated, there was the functional equivalent of an objection to the prosecutor's immunity argument in closing.

No set of instructions could have erased the combined effect of the prosecutor's repeated misrepresentations. Where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to "unring the bell." See, e.g., State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (reversing conviction and quoting State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976)), rev. denied, 118 Wn.2d 1013 (1992). This Court therefore should reverse Farmer's conviction.

3. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Farmer was represented below by appointed counsel. RP 8. The trial court found him indigent for purposes of this appeal. CP 141-42. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, the court expressly found Farmer unable and unlikely to be able to pay non-mandatory legal financial obligations. CP 124. The court therefore imposed only the DNA fee, VPA and criminal filing fee. CP 124. Farmer was also sentenced to serve approximately 34 years in prison. CP 126.

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in "compelling circumstances." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. Sinclair, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. Id. at 392-94. Based on Farmer's indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

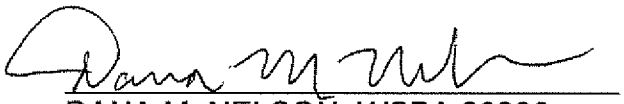
D. CONCLUSION

Because the court erred in failing to instruct the jury on the lesser included offenses of first and second degree manslaughter, this Court should reverse Farmer's conviction. This Court should also reverse because prosecutorial misconduct deprived Farmer of his right to a fair trial. Alternatively, this Court should exercise its discretion and deny any request for costs.

Dated this 31st day of October, 2016

Respectfully submitted

NIELSEN, BROMAN & KOCH



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State v. Brandon Farmer
No. 48991-1-II

Today I filed & E-served per agreement the following documents:

Brief of Appellant, in State v. Brandon Farmer, 48991-1-II in the Court of Appeals, Division II, for the state of Washington, to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Jamila Baker

Jamila Baker
Done in Seattle, Washington

10/31/2016
Date

NIELSEN, BROMAN & KOCH, PLLC

October 31, 2016 - 2:50 PM

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